UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,[1]	Civil Action File No. 11-CV-562 Three-judge panel 28 U.S.C. § 2284
Plaintiffs,	
v.	
Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,	
Defendants.	

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL DISCLOSURE

The discovery process in this case has not begun well. Pursuant to the Court's scheduling order, plaintiffs on November 16, 2011 gave defendants their initial Rule 26 disclosures listing—by name, address and telephone number—each individual likely to have discoverable information. *See* Declaration of Rebecca Kathryn Mason ("Mason Decl."), ¶ 2, Ex. A. In return, defendants gave plaintiffs two pages of generic statements about nameless "individuals" working

[1] On November 18, 2011, plaintiffs filed their Second Amended Complaint and a complementary Motion to Amend the Caption.

in or with the legislature on redistricting. They identified by name only the defendants' staff members who, the state maintains, "had no communications with the Legislature . . . ." *Id.* ¶ 2, Ex. B.

The Rule does not limit initial disclosures to the names of parties who might have discoverable information. It encompasses anyone who might have discoverable information. Yet defendants, represented by the team of lawyers at the Department of Justice ("DOJ"), who also represent the legislature daily, profess to have no knowledge of the individuals and experts who devised the redistricting statute. The Court should compel counsel's compliance with the mandatory requirements of Rule 26.

BACKGROUND

Five months after plaintiffs' complaint, and only three months before trial, defendants contend that they are unable to identify *any* individuals knowledgeable in virtually every subject area relevant to this litigation. Defendants' "disclosures" ignore the explicit language of Rule 26(a)(1)(A)(i). Plaintiffs' counsel has conferred in good faith with counsel for defendants, whose explanations are at best implausible and inconsistent with the boilerplate disclosures they *have* made. Plaintiffs request that this Court compel defendants to do what Rule 26(a) and this Court's November 14 Scheduling and Discovery Order required them to have done five days ago: disclose the name, address, and telephone number of each individual likely to have discoverable information that defendants may use to support their defenses.

This action challenges the constitutionality of the congressional, senate, and assembly districts adopted by the legislature and signed by the Governor on August 9, 2011. Defendants are each sued in their official capacity as members of the Wisconsin Government Accountability Board ("GAB"), the state agency charged with administering elections; they are represented by Attorney General J.B. Van Hollen, Assistant Attorney General Maria S. Lazar, and DOJ.

Plaintiffs and defendants simultaneously exchanged initial disclosures on November 16, 2011, the deadline set in the Scheduling and Discovery Order. *See* Mason Decl., ¶ 2.

In a preface, defendants state: the GAB "did not prepare, edit, or in any other way draft the redistricting maps" and "had no communications with the Legislature, prior to the enactment of the new redistricting maps." Mason Decl., ¶ 2, Ex. B at 1-2. But someone did. Defendants merely note 12 categories of anonymous individuals likely to have discoverable information. Only one of these categories—individuals at GAB who could address "the implementation of the new redistricting maps"—lists any names. *Id.* at 2. The remaining 11 describe only the *kinds* of individuals likely to have discoverable information, including those "from the Legislature, and/or its various bodies" who "were involved in reviewing population and other data . . ." and those "who assisted the Legislature to prevent unnecessary and unconstitutional voter dilution of minority voters." *Id.* at 2-4.

On November 17, 2011, the day after the 4:00 p.m. exchange of disclosures, plaintiffs' counsel notified the Assistant Attorney General by hand-delivered letter that defendants' disclosures were noncompliant. Mason Decl., ¶ 3, Ex. C. Plaintiffs' counsel also e-mailed a copy of the correspondence to the Assistant Attorney General. Plaintiffs requested that defendants provide the identity of the individuals described in their disclosures by 10:00 a.m. on Monday, November 21, 2011. *Id.* Counsel spoke twice on November 18 and again on November 21 and were unable to reach agreement. *Id.* ¶ 5. In a November 18, 2011 e-mail, the Assistant Attorney General stated that she represents "not the party or parties who drew this map," and not "the 'state,'" "but the GAB." *Id.* ¶ 7. That, of course, begs the question.

Five months after the start of litigation, she said, defendants "are in the initial phases of discovery," and their disclosures "were based upon the knowledge and documents in the GAB's possession or control." *Id.* A party's "possession or control" is not the Rule's focus.

DOJ explained that defendants would be "attempting to learn the names of individuals who fit the categories . . . listed" and would amend their disclosures when appropriate. *Id.* Defendants have failed to amend their disclosures.

LEGAL STANDARD/DISCUSSION

Federal Rule of Civil Procedure 26(a)(1)(A)(i) provides, without ambiguity, that

> a party must, without awaiting a discovery request, provide to the other parties . . . the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment[.]

For purposes of a motion to compel, an "incomplete disclosure . . . must be treated as a failure to disclose." Fed. R. Civ. P. 37(a)(4).

On granting a motion to compel, "the court must, after giving an opportunity to be heard," order payment of "the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5)(A). When a party "fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); *see also Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742 (7th Cir.1998) ("[T]he sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless."). Other available sanctions include "payment of the reasonable expenses, including attorney's fees, caused by the failure," as well as "any of the orders listed in Rule 37(b)(2)(A)(i)-(vi)." Fed. R. Civ. P. 37(c)(1). Before moving to compel disclosure, a party must have "in good faith conferred or attempted to confer" with the other side "in an effort to obtain [the disclosure] without court action." Fed. R. Civ. P. 37(a)(1).

Rule 26(a)(1)(A)(i) places only one qualification on the individuals to be identified in the mandatory disclosures: that they be "likely to have discoverable information . . . that the disclosing party may use to support its claims or defenses." The rule says nothing about the relationship between the "individual" and the "disclosing party," because there need not be any relationship. The Federal Rules do not limit a party's disclosure obligations to employees or other individuals with whom it has a direct lawyer-client relationship, especially when a party's counsel has direct knowledge of the information.

Although *documents* outside the disclosing party's "possession, custody, or control" may not need to be identified, Fed. R. Civ. P. 26(a)(1)(A)(ii), no comparable limitation exists with respect to people. Even accepting at face value DOJ's transparent position that it represents not "the state" but "only" the GAB, that distinction does not relieve defendants of their obligation to identify all individuals—including state employees and consultants unaffiliated with the GAB—likely to have discoverable information.

A party "must make its initial disclosures based on the information then reasonably available to it," and it "is not excused from making its disclosures because it has not fully investigated the case." Fed. R. Civ. P. 26(a)(1)(E). "Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case." Fed. R. Civ. P. 26, advisory committee's note to 1993 amendments. The issues, events, and individuals relevant to this litigation fall within a known and circumscribed universe. Counsel cannot avoid identifying those people whose role in the development and passage of the state's new districts make them a *likely* source of discoverable information.

Attorneys with DOJ cannot be suggesting that individuals "from the Legislature, and/or its various bodies" are somehow inaccessible to them or unknown to them; even if they were, that is no obstacle to providing their names. Furthermore, defendants' position is inconsistent

with their own document description, which includes documents and expert reports "in the possession of the Legislature, and/or its various bodies, which were utilized to draft the 2011 redistricting maps." Mason Decl., ¶ 2, Ex. B at 5. "All of the documents listed" by defendants, they concede, "are in the possession of counsel for defendants." *Id.* Somehow, despite in fact saying they have the documents used by the legislature in redistricting, defendants seem unable to provide the identity of those individuals who played any role in the drafting. The names that defendants failed to provide are without doubt "reasonably available" to them and must be disclosed.

Defendants' disclosures do not even approach the line of good faith and reasonableness. Plaintiffs filed their original complaint on June 10, 2011, two months before the new districts were signed into law and more than five months before this motion. This action is set for trial three months from now. At the Court's direction, the parties agreed to an expedited discovery framework in recognition of the unforgiving timetable for the elections whose administration hinges on the resolution of this litigation. Plaintiffs cannot be expected to wait until defendants' "investigation" yields a list of names already known to counsel that defendants were required to disclose from the outset.

The parties and their counsel owe each other a duty of good faith and candor. This litigation addresses the constitutionality of state statutes defining the democratic process. Defendants' counsel know who developed and drafted the statutes. They know the names, addresses and telephone numbers of those in the legislature and those third parties hired by the legislature, some in Wisconsin and some not, who did the work. Legislative immunity may become an issue here but, whatever its reach, it does not infect the mere identification of potential witnesses. Defendants' counsel cannot feign ignorance.

CONCLUSION

Plaintiffs request that this Court enter an order (1) compelling defendants to supply the name, address, and telephone number of all individuals likely to have discoverable information that they may use to support their defense; (2) precluding defendants from using any information or witness they do not disclose in compliance with such an order "to supply evidence on a motion, at a hearing, or at a trial," Fed. R. Civ. P. 37(c)(1); and (3) awarding plaintiffs their costs and fees under Rule 37(a)(5)(A).

Dated: November 21, 2011.

GODFREY & KAHN, S.C.

By: *s/ Rebecca Kathryn Mason*

Rebecca Kathryn Mason
State Bar No. 1055500
Wendy K. Arends*
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
608-257-3911
rmason@gklaw.com

Attorneys for Plaintiffs

**Admission to the United States District Court for the Eastern District of Wisconsin is pending.*

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